SUPREME COURT, U. S. OCT 29 1974

IN THE

Supreme Court of the United States

October Term, 1974.

74—363.

UNITED STATES OF AMERICA,
Petitioner,

v.

RELIABLE TRANSFER CO., INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF RESPONDENT.

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Table of Contents.

	Page
Question Presented	1
The Evidence	5

TABLE OF CASES.

Casement v. Brown, 148 U. S. 615, 625 (1893)	8
Cooper Stevedoring Co. v. Kopke, 40 L. Ed. 20, 694, 700, May 28, 1974	2
Indian Towing Co. v. United States, 350 U. S. 61 (1955)	8
Merritt, Chapman & Scott Corp., v. Cornell Steamship Co., 265 F. 2d 537, 539, 2d Cir. 1959	5
The City of New York, 147 U. S. 72 (1893)	2
The Max Morris, 137 U. S. 1, 8-9, (1890)	3
The Pennsylvania, 86 U. S. (19 Wall) 125, 22 L. E. 148 (1874)	5
United Oil Co. v. San Jacinto, 409 U. S. 140 (1972)	2

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RELIABLE TRANSFER CO., INC.,

Respondent.

BRIEF IN BEHALF OF RESPONDENT.

In behalf of the Reliable Transfer Co., Inc., the following is respectfully submitted in response to the Solicitor General's petition.

Question Presented.

The petition herein seeks an abrogation of the admiralty rule of equal division of damages. For the reasons set forth below, Respondent does not believe that this case presents an appropriate factual situation for a reconsideration of that rule.

(1). Contrary to the Petitioner's view, *the facts* in this case *are in dispute.* While the evidence is not in dispute, very much disputed are the conclusions which the courts below drew from the undisputed evidence (i) that respondent was causatively co-negligent with the Coast Guard and (ii) that respondent's negligence was three times that of the Coast Guard.

We argued in the court below, and *reiterate* here, that on the basis of the evidence as summarized by the trial court, the sole maritime responsibility for the grounding of the vessel was the Coast Guard's statutory tort of failing—in this instance, egregiously—to maintain in operating order a crucially important breakwater light. Support for that conclusion is offered *infra*.

Therefore, we respectfully suggest that the most likely fate of a review of the case, if the Petition were granted, would be a repetition of *United Oil Co. v. San Jacinto*, 409 U. S. 140 (1972). That, of course, would be highly gratifying to respondent.

(2). Even if it fairly may be concluded that there was some causative contributory negligence in the navigation of respondent's vessel, we urge that the contributory effect thereof, if any, was minimal—and even if more than minimal, the proportionate fault at the very worst, was the converse of that attributed by the judgment—we say: certainly no more than 25% may be charged to the navigation of the vessel and not less than 75% to the Coast Guard.

(3). Before going into the evidence in support of the foregoing, it seems to us fair to say that the Petition's argument against the equal division rule proceeds on the erroneous assumption that the rule is predicated upon an "unjust and arbitrary" attribution of equal degrees of fault, regardless of fact. That, we submit, is not the basis of the rule. Rather, with its "major-minor" corollary (*The City of New York*, 147 U. S. 72 [1893], cited by Petitioner on p. 6), the rationale of the rule, we suggest is that where two (or more) parties have been causatively at fault, the *relative degree* of a party's fault *is irrelevant* where the accident would not have occurred in the absence of such fault (cf. *Cooper Stevedoring Co. v. Kopke*, 40 L. Ed. 20, 694, 700, May 28, 1974).

In those circumstances, the accident logically is equally attributable to both (or all) parties regardless of their respective degrees of fault—the more or less (whether 25% or less or 50% or more) in such cases is devoid of realistic consequence since without such fault (whatever its relative degree) the accident would not have occurred. Where the causation thus is joint, of what consequence are the exact proportions? Each party can truthfully say to the other: "If it were not for your negligence, the accident would not have occurred." That being the fact, is it not just and equitable that the consequent loss be borne equally regardless of the degrees of respective fault?

Doubtless, it was such analysis and appraisal that resulted, at common law, in the rule that in such circumstances neither could recover from the other and both (or all) were fully responsible to third parties injured by them. Admiralty, however—probably with more perception—conceived that in such circumstances justice required that, rather than denial of recovery to the mutual tort-feasor, it would be more equitable to hold each party equally responsible to the other (*The Max Morris*, 137 U. S. 1, 8-9, 1890, and cases cited therein) and, as at common law, both (or all) be held fully responsible to third parties. Both rules excluded the notion that greater equity would be achieved between mutual tort-feasors by pro-rating the damages on the basis of respective degrees of fault where (whatever the degree) there would have been no accident without it.

Moreover, such apportionment of causative fault on a percentage basis assumes a non-existent mathematical capability—a capability which the trial judge in this case acknowledged he did not possess when he said (20)*: "Al-

*Numerals in parentheses, except where otherwise indicated, refer to pages of the Government's Petition and its appendages.

location of proportionate fault is not capable of mathematical certainty, but the court's judgment is * * *."

Realistically, can a judge responsibly say 25% rather than 20% or 15% or rather than 30% or 35%? And should a trial court's percentage guess be protected, by the "unless clearly erroneous" rule, against second guessing on the same evidence by a reviewing court.

(4). Nor without weight is the fact that in the 64 years since the promulgation of the "International Convention for the Unification of Certain Rules to Govern the Liability of Vessels When Collisions Occur Between Them," Congress has failed to ratify that convention (Petition, p. 7 footnote). Article 4 of that convention provides for liability "in proportion to the degree of the faults respectively committed" *except*, it is worthy of note, *where "it is not possible to establish the degree of the respective faults," in which cases "the liability shall be apportioned equally* (*id.*; emphasis added).

(5). Here, the trial court found (12):

> "If the *breakwater light had been flashing, he* [*the captain of respondent's vessel*] *would doubtless have been able to change his course in time to avoid stranding.*" (Emphasis added.)

The Court of Appeals agreed (10):

> "The court found, *as common sense would dictate, that if the breakwater light had been operating the captain would not have stranded the vessel.*" (Emphasis added.)

The trial court recognized also that in respect to aids to navigation established by the Coast Guard, "14 U. S. C.

§2, requires that they be maintained in proper order and position" (20).

Since but for the Coast Guard's failure to perform its statutory duty, the vessel would not have been stranded, there comes into play the rule that such breach of a statutory duty casts upon the breaching party the burden to show "beyond a reasonable doubt" that its fault was not the exclusive cause of the accident (*The Pennsylvania*, 86 U. S. [19 Wall.] 125, 22 L. E. 148 [1874]; *Merritt, Chapman & Scott Corp., v. Cornell Steamship Co.*, 265 F. 2d 537, 539, 2d Cir., 1959). Directly the converse is the finding that but for the Coast Guard's neglect of its duty, the accident would not have occurred.

The Evidence.

(As set forth by the Trial Court.)

(1). At the outset of his memorandum and order (12-24), District Judge Judd of the United States District Court for the Eastern District of New York summarized the case as follows (12):

> "This admiralty case tried by the court involves the stranding of the tanker Mary A. Whalen on the sand immediately west of the Rockaway Point breakwater light on a windy night in December when the light was not functioning. The vessel was not driven ashore by the wind, but was steered directly toward the light by a captain who believed that he had open sea ahead. He had misjudged his position after a turning maneuver necessitated by the presence of a tug and tow in his previous course. If the breakwater light had been flashing, he would doubtless have been able to change his course in time to avoid stranding."

(2). The facts regarding the non-functioning of the light on the night of December 23, 1968, when the stranding took place, are set forth by the Judge as follows (17):

> "The Coast Guard was notified five times in a month, on November 29, and December 1, 9, 18, and 22, 1968, that the breakwater light was not operating. The Coast Guard Manual required that this light, being in a major channel, should be restored to operation within two hours after any report that it was out of operation.
>
> "After each outage was reported, the Coast Guard repaired it within from 2½ to 18 hours • • •."

in contrast to the two hour mandate. On the night of December 23, obviously, many multiples of two hours had gone by since the light had gone out on the twenty-second.

> "• • • On December 27, 1968, after the stranding, the batteries were replaced and the light thereafter burned properly" (18).

> *"The Coast Guard did not meet proper standards in its repairs of the Rockaway Point breakwater light. This elevated light, on the lee shore of a relatively narrow marked channel, was an important aid to navigation.* This fact was recognized by its designation in the Light List as requiring urgent attention and repair of any discrepancy within two hours" (18; emphasis added).

> "A night-time verification of the success of the repairs was essential after routine efforts had proven futile. Such a verification should have resulted in discovery of the need to replace the battery before December 23rd • • •." (18-19).

"When lit, that breakwater light was usually visible for about 4 miles" (14).

(3). On the night of the accident, December 23, 1968: "The wind * * * was at gale force, approximately 40 to 45 knots from the northwest, with gusts of greater velocity" (13). At the vessel's entry into the inlet, the "tide was at flood * * *, waves were 8 to 10 feet high" (14).

The mishap is set forth by the trial judge as follows (15): "While navigating through the inlet, when the captain of the vessel saw "a barge ahead off the port side," he "continued on his course, intending to pass the barge and turn in front of it. As he started to pass the barge, he observed the lights of a tug which was pulling it. Since the tug appeared to be stationary, he decided to continue and cross ahead of the tug. On overtaking the barge, however, he noticed that the tug was speeding up and moving further south. He determined that he could not overtake the tug, and decided to turn around and pass astern of the barge." In the course of such maneuvering "he saw a dark shadow ahead and asked the deckhand to shine the search light on it; it proved to be the Rockaway Point breakwater light structure, about 350 feet in front of him. He [thereupon] turned to the left because there were rocks to the right, and the vessel landed broadside in the sand."

The Trial Judge found the captain at fault because, upon realizing that he could not pass the tug and tow that were ahead, he made a radical change of course without making sure of his position by using the "chart, searchlight, radio-telephone, and radar" with which the vessel was equipped (19-20). That assumes that in the exigencies of the emergency with which the captain was confronted—including a "gale blowing at 45 knots" and

"8 to 10 foot seas" (19) —he had the time and opportunity to utilize the enumerated facilities, when, in fact, he was bent on avoiding colliding into the tug or tow.

But for the non-functioning of the breakwater light, the captain would have known his position.

That, because of the absence of the light, the captain "miscalculated [his] exact location," in the words of somewhat analogous *Casement v. Brown*, 148 U. S. 615, 625 (1893),* "does not subject [him] to the condemnation of negligence." That is "placing too severe a condemnation on the conduct" of a captain in order to relieve, in this case, the Coast Guard "from liability for the results of their * * * certainly undoubted * * * negligence" (at p. 626).

In *Indian Towing Co. v. United States*, 350 U. S. 61 (1955), this Court said (at p. 69):

> "The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act."

(5). As already noted, Judge Judd found and the Court of Appeals agreed: "If the breakwater light had

*The cause there was a submerged pier.

been flashing,' [the captain] would doubtless have been able to change course in time to avoid stranding" (12).

Such being the case, it seems startling that the Judge came to the conclusion not only that the captain was at fault but that his "fault was more egregious than the fault of the Coast Guard" (19).

On the basis of the findings quoted at pages , *supra,* the adjective "egregious," applies to the negligence of the Coast Guard and not to the conduct of the captain in the emergency created by the absence of light on the breakwater in the midst of 1. an embarrassing tug and tow, 2. winds of gale force and 3. heavy water.

October 25, 1974.

Respectfully submitted,

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